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IN THE

SUPREME COURT OF THE UNITED STATES.

In the Matter of CONSORTO CONSTRUCTION CO., INC.,
Bankrupt.

MORTON Q. KLEIN and STANLEY B. COOPER, Surviving Trustees,

Petitioners,

EQUITY INVESTMENT COMPANY,

Respondent.

Term: No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Morton Q. Klein and Stanley B. Cooper, surviving trustees in bankruptcy of Consorto Construction Co. prays that a Writ of Certiorari issue to review the

judgment of the United States Court of Appeals for the Third Circuit entered in the above captioned case on May 3, 1954. The Court consisted of Judges Goodrich, McLaughlin and Hastie. Judge McLaughlin dissented.

OPINIONS BELOW.

The Opinion of Referee in Bankruptcy, L. Leroy Deininger (R. 14a). The majority Opinion, as well as the statement of Judge McLaughlin's dissent, of the United States Court of Appeals for the third circuit appear in the appendix at page 11. The opinion is not yet reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 3, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

The issue raised by this Petition is an important one as it frequently occurs in bankruptcy proceedings. The question is whether a trustee in bankruptcy, under section 70 e (1) of the Bankruptcy Act of 1898, 11 U. S. C. Chapter 7, Section 110 (e) (1) prevails over the holder of a chattel mortgage who has unreasonably delayed the recording of the mortgage to the detriment of innocent persons who

have extended credit to the mortgagee during the time that the chattel mortgage was unreasonably withheld from filing of public record. The question requires the construction of the state statutes which provide for chattel mortgages, but fix no time within which such mortgages must be recorded. The decision of the Court of Appeals for the Third Circuit, in the instant case conflicts with decisions of the United States Courts of Appeal for the Second, the Sixth and the Eighth circuits.

The basis for federal jurisdiction in the first instance in this case is section 23 of the Bankruptcy Act U. S. C., Title 11, Chapter 4, Sec. 46.

In February, 1951, Consorto Construction Co. the bankrupt, borrowed money from Equity Investment Co. On March 9, 1951, Consorto secured the loan by executing and delivering a chattel mortgage to Equity. Thereafter Equity pocketed the chattel mortgage and did not record it for four months and twenty-five days. During this period, innocent merchants advanced credit to Consorto without knowledge of the mortgage. Four months and five days later, Consorto became a bankrupt.

The question requires an interpretation of a state statute, the Pennsylvania Chattel Mortgage Act[1] (Act of June 1, 1945, P. L. 1358 as amended, 21 Purdon, Penna. Statutes Annotated 940.1, et seq.) which fixes no time within which a mortgage must be recorded.

The question is whether the dictates of a sound public policy and the law's abhorrence of secret liens and conveyances demand that the statute be so construed as to require recordation within a reasonable time to validate the lien of

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[1] Repealed and superseded by the Uniform Commercial Code, as enacted April 6, 1953, P. L. , Purdon, Pennsylvania Statutes Annotated, Vol. 12, Section 9—101, et seq., which similarly fails to provide any fixed period of time within which a chattel mortgage must be recorded: Purdons, Pennsylvania Statutes Annotated, Volume 12 A, Section 9—301 and 401, et seq. The issue presented by this Petition, therefore, persists as an important question in the interpretation of the Uniform Commercial Code.

the mortgage as against the claims of innocent, intervening, unsecured creditors.

Similar statutes[2] of other states have been so construed by the United States Court of Appeals for the Second Circuit, the Sixth Circuit and the Eighth Circuit as well as by the courts of last resort of the states of New York, Missouri, Michigan, New Jersey and California. No contrary interpretation of any existing similar statute has ever been adopted by any other court.

STATUTE INVOLVED.

Pennsylvania Chattel Mortgage Act, Act of June 1, 1945, P. L. 1358 as amended May 23, 1947, P. L. 270, Sec. 1; 21 Purdon, Pennsylvania Statutes Annotated, 940.1, et seq.

Pertinent text quoted in Appendix B.

STATEMENT.

This case arises out of a reclamation proceeding in a pending bankruptcy. The Consorto Construction Co. is the bankrupt. Consorto gave Equity, the reclamation petitioner, a

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[2] New York: New York Chattel Mortgage Act, Section 230, as amended L. 1911, c. 326; L. 1916, c. 348; L. 1921, c. 419; L. 1937, c. 810, eff. June 1, 1937.

Missouri: Missouri Chattel Mortgage Act (Mo. St. Ann., Sec. 3097, p. 1919).

California: Civil Code of Cal., Deering, 1949, Sec. 2963, page 490.

Michigan: Public Acts of Michigan 1935, No. 129, Sec. 10; 19 Michigan Statutes Annotated, 26.929, 1953 volume.

New Jersey: New Jersey Statutes Annotated (Purdon) Title 46: 28-5, page 272.

chattel mortgage to secure an antecedent debt on March 9, 1951. Consorto was then engaged in the construction business and the mortgage covered virtually all of its equipment. Equity did not record the mortgage for four months and twenty-five days. The only possible explanation, other than negligence, for this long continued failure to record, was a desire to maintain the debtor's credit to enable the debtor to remain in business, make purchases on open account, and thereby realize funds for the required installment payments to Equity. This purpose was accomplished. Consorto obtained credit from unsuspecting suppliers who have never been paid. Equity recorded the mortgage almost five months after receiving it and four months and five days later Consorto became a bankrupt.

The trustees claimed title to the equipment under section 70 e (1) of the Bankruptcy Act, U. S. C. Title 11, Sec. 110 (e) (1) and Equity filed a reclamation petition. By stipulation, the parties agreed that the equipment be sold and the lien, if any, relegated to the proceeds.

Thereafter the issue was submitted to the Referee upon an agreed statement of facts (R. 11a). The Referee dismissed the reclamation petition and wrote an opinion which was subsequently described by Court of Appeals Judge McLaughlin as "excellent." (Page 17 infra.)

A Certificate of Review was filed with the District Court for the Eastern District of Pennsylvania which affirmed the action of the Referee. An appeal to the Circuit Court followed.

REASONS FOR GRANTING CERTIORARI IN THIS CASE.

This Petition for Certiorari is filed to review a decision which is squarely in conflict with the decisions of the United

States Courts of Appeals for the Second, the Sixth and the Eighth Circuits:

In re Moraes Construction Co., Inc. (Zamore v. Goldblatt) (C. A. 2nd), 194 F. 2nd 933, certiorari denied 343 U. S. 979 (1952), construing the similar statute of the State of New York, supra.

U. S. Hoffman Machinery Corp. v. Lauchli (C. A. 8th), 150 F. 2nd 301, and

Mercantile Trust Co. v. Kahn (C. A. 8th), 203 F. 2nd 449 (1953), construing the similar statute of the State of Missouri, supra.

General Motors Acceptance Corp. v. Collier (C. A. 6th), 106 F. 2nd 584, certiorari denied, 309 U. S. 682, construing the similar statute of the State of Michigan, supra.

The decision from which the appeal is sought also conflicts with the decisions of every state court which has reviewed current chattel mortgage statutes presenting the same question:

TOOKER v. SIEGEL-COOPER CO., 194 N. Y. 442, 87 N. E. 773.

New Brunswick Motor Truck Sales, Inc. v. Scott, 114 N. J. L. 231; 176 Atl. 375 (1935), construing the similar statute of the State of New Jersey, supra.

Ruggles v. Cannedy, 127 Cal. 290; 53 P. 911; 59 P. 827, construing the similar statute of the State of California, supra.

JACQUES v. GOGGIN, 362 Mo. 1005, 245 S. W. 2nd 904 (1952).

The Pennsylvania statute, supra, like the statutes of New Jersey, Michigan, California, Missouri and New York, does not require that a chattel mortgage be recorded within any fixed time. The Act merely provides the following with respect to recordation:

> "Any chattel mortgage executed pursuant to this Act shall be a lien upon the property therein described which lien shall be good and valid against and superior to all rights of subsequent purchasers, subsequent mortgagees and other subsequent lienors and encumbrancers and all persons subsequently dealing with the mortgaged property or subsequently acquiring an interest therein from the time of filing of the mortgage, as provided in Section eight of this Act: * * *" (Act of June 1, 1945, P. L. 1358, Sec. 5; 21 Purdon, Pennsylvania Statutes Annotated 940.5).
>
> "* * * When so filed such chattel mortgage shall constitute a lien on the property described and conveyed thereby from the time of such filing which lien shall be good and valid as hereinbefore provided * * *" (Act of June 1, 1945, P. L. 1358, Sec. 8 as amended May 23, 1947, P. L. 270, Sec. 1; 21 Purdon, Pennsylvania Statutes Annotated, 940.8).

This is a case of first impression under the Pennsylvania statute. It is contended that the Pennsylvania statute should be interpreted as the similar statutes of New Jersey, Michigan, California, Missouri and New York were interpreted by the Circuit and State Courts in the cases cited.

These authorities decided that where a statute fixes no definite time within which a chattel mortgage must be recorded, then the statute must be so construed as to require recording within a reasonable time to give it priority over the rights of subsequent creditors.

Any other result would pave the way for secret liens, secret conveyances and wholesale fraud. The inference is obvious in this case that the mortgage was withheld from record in order to avoid impairing the credit of Consorto. Recordation would have warned subsequent creditors to withhold credit. The delay in recording was the ruse by which Equity enticed others to grant Consorto the credit necessary to remain in business five months longer so that Equity would receive further payments on account.

In the case of *Mercantile Trust Co. v. Kahn*, supra, the United States Court of Appeals for the Eighth Circuit decided that:

"The foregoing authorities determine conclusively that the chattel mortgage is void as to the intervening creditors. The authorities are also conclusive that it is void as to the trustee. 11 U. S. C. A. Bankruptcy §110 provides '* * * (e) (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is * * * voidable * * * by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.' That this statute is applicable to the situation here cannot be doubted. See Moore v. Bay, 284 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133; Buffum, Trustee v. Peter Barcelous Co., 289 U. S. 227, 53 S. Ct. 539, 77 L. Ed. 1140," at page 450.

CONCLUSION.

The issue presented by this appeal is an important one in view of the tremendous volume of credit which is extended in secured transactions and which will be extended in such transactions under the new Uniform Commercial Code, supra, which has been adopted in Pennsylvania. The Uniform Commercial Code, Article 9, Sections 301 and 401, et seq., supra, like the Pennsylvania Chattel Mortgage Act, supra, and the statutes of New York, Missouri, California, New Jersey and Michigan, supra, specifies no particular time within which a chattel mortgage must be recorded.

Bankruptcy courts are frequently required to determine the validity of liens in cases where the lienor has unreasonably withheld the instrument creating the lien from public record in order to avoid an impairment of the debtor's credit. The Courts in the cases cited have labelled this as the fraudulent practice that it is and have protected the rights of the innocent intervening creditors. Unfortunately for the progress of the law and the subsequent interpreta-

tion to be given to the filing provisions of the Uniform Commercial Code, supra, in cases of secured transactions, the decision appealed from represents a backward step. This interpretation should not be permitted to stand in conflict with the more realistic decisions cited.

Presently there is a conflict in the interpretation to be given such statutes between the decisions of the Second, Sixth and the Eighth Circuits on the one hand and the Third Circuit in the instant case. That conflict should be resolved.

It is respectfully submitted that the correct ruling is the one adopted by United States Court of Appeals Judge McLaughlin who dissented in this case. Therefore, certiorari should be granted.

EDWARD H. CUSHMAN,
NATHAN LAVINE,
MILLER, ADELMAN & LAVINE,
Attorneys for Petitioners.

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,216.

In the Matter of CONSORTO CONSTRUCTION CO., INC.,
Bankrupt.
EQUITY INVESTMENT COMPANY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued February 1, 1954.

Before: GOODRICH, McLAUGHLIN and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed May 3, 1954.)

By HASTIE, Circuit Judge.

In February, 1951, Consorto Construction Company, the bankrupt, borrowed money from Equity, the appellant in this action. On March 9, 1951, as security for the loan, Consorto executed and delivered to Equity its bond, warrant, and chattel mortgage covering specified personal property. All of this happened in Pennsylvania. The chattel mortgage was executed in accordance with the 1945 Pennsylvania Chattel Mortgage Act,[1] but it was not recorded until August 3, 1951. More than four months after the recording, Consorto was adjudicated bankrupt.

Averring title to the mortgaged chattels, appellant filed a reclamation petition demanding that the receiver surrender possession of them. The receiver resisted the petition. It was agreed, however, that the property be sold and the proceeds held by the receivers subject to final determination of appellant's right under the reclamation petition. Upon hearing before the referee counsel stipulated all the above facts and, in addition, that between the date of execution and date of recording of the mortgage certain persons had become unsecured creditors of the bankrupt, and a United States tax lien and a Pennsylvania lien for unpaid corporation taxes had been entered of record against the bankrupt.

The trustee opposed the reclamation petition on the ground that the delay in recordation made the mortgage void against him. The referee dismissed the petition on

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[1] 21 P. S. §§940.1-940.16, more recently repealed and superseded by the Uniform Commercial Code, as enacted April 6, 1953, P. L. —.

that ground. The district court sustained the referee. Equity, the chattel mortgagee, appealed.

In order for the trustee to prevail, he must invoke either Section 70(c) or 70(e) of the Bankruptcy Act. 11 U. S. C. §110(c) or 11 U. S. C. §110(e). Neither Section 60 nor Section 67 is applicable because bankruptcy occurred more than four months after the filing of the instrument.

Section 70(c) provides in relevant part:

> "* * * The trustee, as to all property in the possession * * * of the bankrupt at the date of bankruptcy * * * shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; * * *"

The trustee's rights under this Section are not derivative. They are not rights of any existing creditor to which the trustee is subrogated but are independent rights, of such character as a described hypothetical creditor would have enjoyed, created by the Bankruptcy Act itself. In this case the trustee's rights against the mortgagee under Section 70(c) are those which Pennsylvania law would give such a creditor as Section 70(c) describes, with a lien created as of the date of bankruptcy.

The mortgagee bases its claim on the following provision of the Pennsylvania Chattel Mortgage Act:

> "Any chattel mortgage executed pursuant to this act shall be a lien upon the property therein described, which lien shall be good and valid against and superior to all rights of subsequent purchasers, subsequent mortgagees, and other subsequent lienors and encumbrancers, and all persons subsequently dealing with the mortgaged property, or subsequently acquiring an interest therein from the time of filing of the mortgage * * *" 21 P. S. §940.5.

If the mortgagee here preceded in such a way as to obtain the full protection of the quoted provision, the subsequent lien of the trustee under Section 70(c) is the subordinate lien. This is not disputed. But it is argued that the chattel mortgagee's claim is not protected by the Pennsylvania Chattel Mortgage Act solely[2] because of the tardy recordation of the instrument.

The Pennsylvania Act states no time within which recordation must be effected. Here nearly five months elapsed between the execution and the filing of the mortgage. No Pennsylvania case has considered the effect of such delayed recording. Therefore, without guidance from Pennsylvania courts, we construe the statute in a manner we believe reasonable and consistent with the best considered judicial construction of other similar chattel mortgage statutes.

Before 1931, the Illinois chattel mortgage statute made no provision as to time within which recordation was required. This was judicially construed to mean that a chattel mortgage could be recorded at any time after execution and still be a valid lien as against rights thereafter acquired by third persons. The only risk of tardy filing was that some third person might acquire a lien on the chattel prior to the time the mortgagee perfected his lien by recordation. See *Collateral Finance Co. v. Braud*, Ill. App. 1939, 18 N. E. 2d 392, 394. A similar construction was given to an early Rhode Island statute which provided no time for recording. *Commercial Nat. Bank v. Colton*, 1891, 17 R. I. 226, 21 Atl. 349. See also discussion and cases cited in *Barber v. Reina Nash Motor Co.*, Wyo. 1953, 260 Pac. 2d 928, 931-932.

We are urged to adopt the contrary construction of the Missouri statute which has been held to make recording in-

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[2] Under the Pennsylvania statute the fact that a chattel mortgage is given for a pre-existing debt does not make the recorded security transaction any less effective. 21 P. S. §940.4.

effective, unless accomplished within a "reasonable time" after execution, even though no time is specified in the act. But the Missouri courts have also construed their statute to make the lien which is acquired upon timely recording effective retroactively to the time of execution of the instrument. The Pennsylvania Act on the other hand states in explicit terms, and it has been judicially recognized, that the chattel mortgage becomes a lien only from the time of filing. *Ferbro Trading Corp. v. Jo-Mar Dress Corp., et al.*, 1951, 78 D. & C. 337, 343. This distinction is significant. To allow a chattel mortgagee to delay recording as long as he may choose and still obtain priority as of the day of execution over a subsequent lienor who in the meantime has perfected his lien without knowledge of the chattel mortgagee's unperfected lien would be manifestly unfair. Therefore, where, as under the Missouri Act, recording relates the lien back to the date of execution, prompt recording must be required in order to avoid this injustice. But the absence of this relation back under the Pennsylvania Act prevents this problem of injustice from arising, whether recording be prompt or delayed. For only the subsequent lienor who has notice of the chattel mortgage through its recording is subordinated.

There are other statutes, notably those of California and New Jersey, which state no time for recording yet are construed to require immediate recording in order for the instrument to be valid even though they do not, like the Missouri statute, relate the lien back to the execution date. *Ruggles v. Cannedy*, 1898, 127 Cal. 290, 53 Pac. 911; *Roe v. Meding*, 1895, 53 N. J. Eq. 350, 33 Atl. 394. Courts which adopt this construction seem to be persuaded that there is a danger of imposition on unsecured creditors of the mortgagor if a delayed filing is held to create a lien even from the time of recordation. But the same result can be obtained merely by re-executing the old unrecorded mortgage and recording this "new" instrument at once. It seems worthless formalism to require such re-execution of the old

instrument as a basis for effective recordation. We think that a chattel mortgage while unrecorded can be fairly recognized as having a potential like a pledge, originally ineffective for failure to deliver possession. In the latter situation, a subsequent delivery will generally perfect the pledge except as to bona fide purchasers or creditors who have acquired liens prior thereto. Brown, Personal Property, §128. Under the 1945 Pennsylvania Chattel Mortgage Act, we believe it to be the proper construction that a tardy recording will perfect the lien of a chattel mortgagee as of the date of recordation.

Here the chattel mortgagee obtained a lien August 3, the date of recording. Anyone subsequently obtaining an interest in or claim against the property was subordinated to that lien. Under Section 70(c) the trustee's position is that of such a subsequent lienor, "holding a lien * * * by legal or equitable proceedings" as of the date of bankruptcy, a time more than four months after Equitable perfected its mortgage lien.

The trustee is in no better position under Section 70(e) which provides:

> "A[n] * * * obligation incurred by a debtor adjudicated a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

Under this subdivision the trustee is subrogated to the rights of existing creditors as to whom the obligations of the bankrupt are voidable.

Under the common law of Pennsylvania chattel mortgages were viewed with disfavor. Any such attempt to mortgage personalty which was left in the possession of the mortgagor did not give the mortgagee any lien or legal priority over other creditors. *Roberts' & Pyne's Appeal,*

1869, 60 Pa. 400; *Rowland v. Clark*, 1915, 250 Pa. 192, 95 Atl. 451. This background considered, the Pennsylvania courts have rather clearly indicated their view that the limited effect of the 1945 Chattel Mortgage Act has been to create a new statutory lien which attaches only when a chattel mortgage is filed as prescribed by the statute. *Seaboard Consumer Discount Co. v. Landau's*, 1950, 167 Pa. Super. 180, 74 A. 2d 737; *Ferbro Trading Corp. v. Ja-Mor Dress Corp., supra.* Until that time the mortgagee has no lien status upon which to predicate priority over any other creditors.[3] But from the time of recording the mortgagee acquires a lien valid against all general creditors and senior to liens which attach thereafter.

For present purposes the significance of the foregoing analysis is this. The basic obligation which made Equitable a creditor of the bankrupt is of course valid and unchallenged. The lienor's subsequent course of action to acquire security in the form of the lien of a chattel mortgage culminated and became effective for the first time when the instrument was recorded. Any other lien perfected before that time prevails not under any concept that the lien of the chattel mortgage is voidable, but by reason of priority in time. General creditors who gave credit either before or after the execution of the mortgage are subordinated because such is the character and effect of the Pennsylvania statute which recognizes the recording of a chattel mortgage, though given for an antecedent debt, as creating a statutory lien valid against all but prior lienors. Of course, in certain circumstances, the acquisition of such priority may amount to a preference which can be invalidated by bankruptcy proceedings at any time during the ensuing four months. Indeed, this is the normal

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[3] Of course this does not prevent the mortgagee from using the instrument executed by the mortgagor as a basis for asserting a claim to the goods which will be good against the mortgagor or another standing in his shoes. First National Bank of McAdoo v. Reese, 1947, 356 Pa. 175, 51 Atl. 806.

way in which the unsecured creditor protects himself against the creation of such liens by a debtor who cannot meet all of his obligations. We are not impressed by an argument of appellee that a creditor would not regard a tardy recording as a preference against which he must protect himself by appropriate proceedings if the debtor should become insolvent. A creditor who learns of a tardily recorded chattel mortgage and acts without counsel has no reason to be assured that such an apparently regular instrument is legally ineffective. On the other hand, counsel confronted with such a situation would know that the 1945 statute and decisions under it are silent on the required time of recording, and that views in other states are conflicting. Certainly, counsel for a creditor concerned about preferences would not advise his client that a tardily recorded Pennsylvania mortgage could safely be disregarded. In sum, the creditor has full and fair notice and opportunity to protect himself against any preference created by a tardy recording of a chattel mortgage.

We see no basis for saying that the obligation to Equitable or the transaction whereby it acquired security was voidable as to any creditor within the meaning of Section 70(e).

The judgment will be reversed.

McLAUGHLIN, Circuit Judge, dissenting:

I would affirm the order of the district court for the reasons stated in the excellent opinion of Referee Deininger.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

PENNSYLVANIA CHATTEL MORTGAGE ACT.

Act of June 1, 1945, P. L. 1358 as amended May 23, 1947, P. L. 270, Sec. 1; 21 Purdon, Pennsylvania Statutes Annotated, 940.1 et seq.

"Any chattel mortgage executed pursuant to this Act shall be a lien upon the property therein described which lien shall be good and valid against and superior to all rights of subsequent purchasers, subsequent mortgagees and other subsequent lienors and encumbrancers and all persons subsequently dealing with the mortgaged property or subsequently acquiring an interest therein from the time of filing of the mortgage, as provided in Section eight of this Act: * * *" (Act of June 1, 1945 P. L. 1358, Sec. 5; 21 Purdon, Pennsylvania Statutes Annotated 940.5.)

"* * * When so filed such chattel mortgage shall constitute a lien on the property described and conveyed thereby from the time of such filing which lien shall be good and valid as hereinbefore provided * * *" (Act of June 1, 1945, P. L. 1358, Sec. 8 as amended May 23, 1948, P. L. 270 Sec. 1; 21 Purdon, Pennsylvania Statutes Annotated, 940.8.)

JUDGMENT.

Present: GOODRICH, McLAUGHLIN and HASTIE,
Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

Attest:
IDA O. CRESKOFF,
Clerk.

May 3, 1954.

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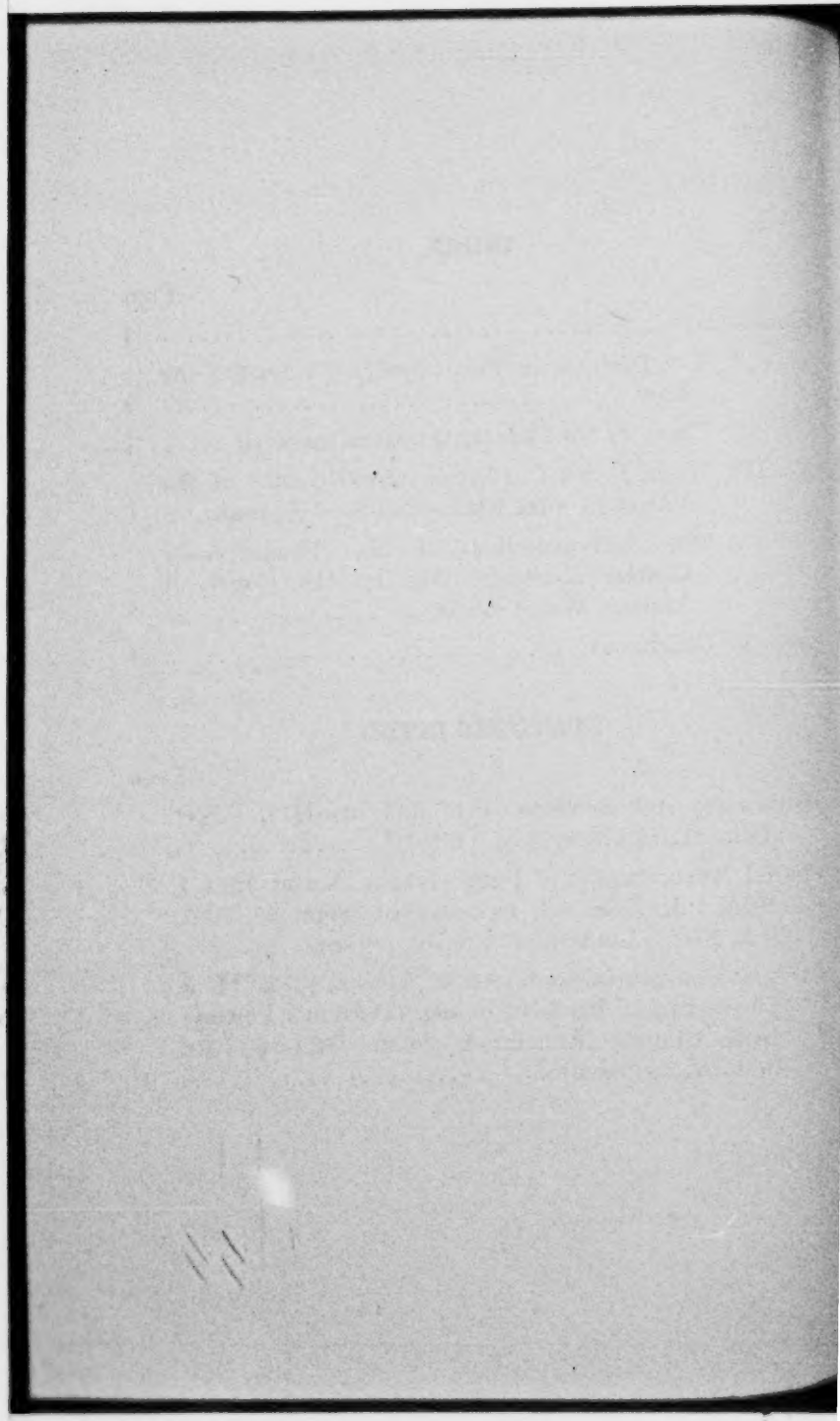

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1954.

No.

In the Matter of CONSORTO CONSTRUCTION CO., INC., Bankrupt.

MORTON Q. KLEIN AND STANLEY B. COOPER, SURVIVING TRUSTEES,
Petitioners,

EQUITY INVESTMENT COMPANY,
Respondent.

BRIEF ON BEHALF OF EQUITY INVESTMENT COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

I. The Decision in This Case Is No Longer the Law.

The decision of the United States Court of Appeals for the Third Circuit in this case is not one of universal applicability. In this jurisdiction it is no longer the law. Transactions such as occurred here are now controlled by the Uniform Commercial Code adopted by the Legislature of Pennsylvania and effective July 1, 1954.[1]

II. There Is No Federal Question Involved.

This case presented solely the interpretation of a state statute, namely the Chattel Mortgage Act of Pennsylvania,[2]

1. Act of April 6, 1953, P.L. 3, § 1 et seq.; 12 PS 1-101 et seq. (Purdon's Pennsylvania Statutes Annotated, Volume 12A, §§ 1-101 to 9-507, inclusive).

2. Act of June 1, 1945, P.L. 1358, § 1, as amended, Sept. 29, 1951, P.L. 1632, § 1 et seq.; 21 PS 940.1 et seq.

now superseded by the Uniform Commercial Code. The applicability of the Bankruptcy Act depended solely and entirely upon the question of whether or not Respondent had obtained a lien under the law of Pennsylvania.

The chattel mortgage given by the bankrupt to Respondent was executed on March 9, 1951, and was recorded on August 3, 1951. Both execution and recording were admittedly valid as to form and method under the laws of Pennsylvania. The Petitioners based their claim below entirely upon the ground that the elapsed time between execution and filing was unreasonable and, therefore, claimed title to the mortgaged equipment under Sections 70(c) and 70(e)(1) of the Bankruptcy Act, U. S. C. Title 11, §§ 110(c) and 110(e)(1). The learned Court below, speaking through Judge Hastie, adequately disposed of this contention, stating, in its opinion (Petitioners' Appendix, page 15):

> "Here the chattel mortgagee obtained a lien August 3, the date of recording. Anyone subsequently obtaining an interest in or claim against the property was subordinated to that lien. Under Section 70(c) the trustee's position is that of such a subsequent lienor, 'holding a lien * * * by legal or equitable proceedings' as of the date of bankruptcy, a time more than four months after Equity perfected its mortgage lien.
>
> "The trustee is in no better position under Section 70(e) which provides:
>
> > "'A[n] * * * obligation incurred by a debtor adjudicated a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.'

Under this subdivision the trustee is subrogated to the rights of existing creditors as to whom the obligations of the bankrupt are voidable."

Bankruptcy in this case occurred more than four months after Respondent's chattel mortgage was filed in accordance with the applicable state statute. Accordingly, no "preference" existed.

Therefore, it is manifestly clear that this was purely a case of a Federal Court being required to interpret a state statute where no decision of the state courts was available for its guidance. Once having decided that Respondent's lien existed in accordance with that state statute, the Bankruptcy Act could not apply.

III. There Is No Conflict in the Decisions of the Various United States Courts of Appeals.

Petitioners state that the decision of the Third Circuit in this case is squarely in conflict with decisions of the Courts of Appeals for the Second, Sixth and Eighth Circuits. It hardly seems necessary to state that there can be no such conflict since, in each instance, the Courts of Appeals were interpreting Chattel Mortgage Acts of the states in which such Courts were sitting. The learned Court below has amply clarified, in its opinion, the difference between the various state statutes involved in each case cited by Petitioners (Petitioners' Appendix, pages 13, 14 and 15).

IV. The Interpretation of the Pennsylvania Chattel Mortgage Act by the Court of Appeals Was Correct.

Aside from the fact that this decision is of no effect with respect to controlling future security transactions in Pennsylvania under the Uniform Commercial Code, the interpretation of the Pennsylvania Chattel Mortgage Act is not only a logical one, but is dispositive, as is so ably stated in the lower court's opinion, of the contention raised by Petitioners that the decision of the Court of Appeals

will "pave the way for secret liens, secret conveyances and wholesale fraud". The Petitioners' entire position is based upon the concept that the failure to record an executed chattel mortgage within a reasonable time voids the mortgage because credit without security can be extended by third parties without knowledge of the existence of the chattel mortgage.

Since it is clear, and uncontroverted by Petitioners, that the law of Pennsylvania provides that a lien creditor obtains priority over unsecured creditors irrespective of when the lien is acquired, the construction of the statute sought by the Petitioners is without merit. The unsecured creditors would have been in no different position had Respondent's chattel mortgage been executed on the same day it was filed. Nor would they have been in any different position, as the Court of Appeals pointed out in its opinion, had Respondent merely re-executed the old unrecorded mortgage and recorded the "new" instrument at once. Judge Hastie stated: "It seems worthless formalism to require such re-execution of the old instrument as a basis for effective recordation."

In substance, Petitioners' entire position is based upon an effort to read into the Pennsylvania Chattel Mortgage Act provisions contained in the statutes of other states and to apply the decision of law of other states, interpreting different statutes, to a Pennsylvania statute. The Chattel Mortgage Act of Pennsylvania is clear and concise in its terms and we submit that the opinion of the Court of Appeals properly recognizes this fact.

V. Conclusion.

It is, therefore, respectfully submitted that the Petition should be denied.

Respectfully submitted,

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